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Supreme Court of the United States

OCTOBER TERM, 1944

No. 1281

GRACE B. MARTIN and CELIA KING,
Petitioners,

vs.

MARION SCHILLO, ADELE SCHILLO and DOROTHY S. FISCHER,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

S. ASHLEY GUTHRIE,
120 South La Salle Street,
Chicago (3), Illinois
Counsel for Respondents.

THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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STATEMENT OF THE CASE.

The petitioners ask this court to review a decision of the Supreme Court of Illinois (Tr. 62-66; 60 N. E. 2d 392) construing the Illinois statute relating to attachments, and holding void a sheriff's deed issued to petitioners purporting to convey to them certain property of respondents sold on execution on a default judgment rendered against the respondents in an attachment proceeding.

The original attachment suit was filed by Edward H. S. Martin against the respondents (Tr. 1-7). They were not served with process and did not appear. The jurisdiction of the court in the attachment case to render judgment against them and to attach their property rested wholly on the statutory affidavit for attachment and upon constructive service by publication and mailing. Upon the failure of the respondents to appear and plead, judgment was entered against them in August, 1942 (Tr. 13-14). Execution and sheriff's sale followed and, there being no redemption during the statutory period, a sheriff's deed issued to the petitioners in December, 1943, purporting to convey to them the attached property (Tr. 20-21). The petitioners claim to be strangers to the proceedings although one of them is the wife of the plaintiff and judgment creditor Martin, and the other is the wife of Martin's attorney of record (Tr. 17).

Shortly after this sheriff's deed was executed, the respondents filed their petition (Tr. 16-21) in the attachment proceeding, asking that the court declare the judgment void for want of jurisdiction and set it aside, and that the court likewise declare void the execution and sheriff's sale and deed which rested upon the judgment for their validity. The petitioners, having acquired an interest under the judgment, were made parties to the petition and appeared and pleaded thereto (Tr. 25, 30-33), so that there was no question as to the personal jurisdiction of the Illinois court over them in this case.

The grounds upon which the default judgment in attachment was attacked by respondents were (so far as material here) (Tr. 12-18):

> (1) That the affidavit for attachment (Tr. 7-8) which is the foundation of the proceeding, was defective in that it stated the various statutory grounds in the alternative and thus did not state any ground positively; and

(2) That the constructive service was fatally defective because notice was mailed to one of the respondents at an address other than that set forth in the affidavit and was never received by her.

The Illinois trial court sustained both grounds and entered an order finding and declaring that the judgment was void on the face of the record, and hence that the consequent execution, sheriff's sale and deed were likewise void (Tr. 37-8).

The Illinois Supreme Court, in affirming the order of the trial court, rests its decision on the insufficiency of the affidavit for attachment, holding that in view of the fatal defects in the affidavit, it was unnecessary to consider the question raised as to the sufficiency of the service by publication and mailing (Tr. 63-66).

The controlling question in the case, therefore, was whether, under the law of Illinois, an affidavit for attachment stating the statutory grounds in the alternative, and stating no ground positively, is sufficient to give the court jurisdiction. The Illinois Supreme Court, construing the Illinois statute, held that the affidavit was not sufficient; that the defect, being apparent of record, was one of which all persons claiming under the judgment were required to take notice; and hence that the judgment and the sheriff's sale and deed were void.

The petitioners were parties to the proceedings in which the attachment judgment and the title they claimed under it were attacked. They appeared and were heard. The court decided against them, wholly on the construction of the Illinois statute. Under these circumstances, there is no ground for any serious claim that they were deprived of their property without due process of law or that any federal question is involved in this case.

ARGUMENT.

I.

THE DECISION OF THE ILLINOIS SUPREME COURT INVOLVED ONLY A CONSTRUCTION OF A STATE STATUTE AND IS NOT THEREFORE SUBJECT TO REVIEW BY THE UNITED STATES SUPREME COURT; THERE IS NO FEDERAL QUESTION INVOLVED.

The decision of the Supreme Court of Illinois rests on the construction of the following Illinois Statute (Secs. 1 and 2 of "An Act in regard to attachments in courts of record"; Ill. Rev. Stat. 1943, Ch. 11, Secs. 1 and 2):

"Sec. 1. *Causes.*

That in any court of record having competent jurisdiction, a creditor having a money claim, whether liquidated or unliquidated, and whether sounding in contract or tort, may have an attachment against the property of his debtor, or that of any one or more of several debtors, either at the time of instituting suit or thereafter, when the claim exceeds $20, in any one of the following cases:

First: Where the debtor is not a resident of this State.

Second: When the debtor conceals himself or stands in defiance of an officer, so that process cannot be served upon him.

Third: Where the debtor has departed from this State with the intention of having his effects removed from this State.

Fourth: Where the debtor is about to depart from this State with the intention of having his effects removed from this State.

Fifth: Where the debtor is about to remove his property from this State to the injury of such creditor.

Sixth: Where the debtor has within two years preceding the filing of the affidavit required, fraudulently

conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.

Seventh: Where the debtor has, within two years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.

Eighth: Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors.

Ninth: Where the debt sued for was fraudulently contracted on the part of the debtor; Provided, the statements of the debtor, his agent or attorney, which constitute the fraud, shall have been reduced to writing, and his signature attached thereto, by himself, agent or attorney.

* * * * *

"Sec. 2. *Affidavit—Statement—Examination under oath.*

"To entitle a creditor to such a writ of attachment, he or his agent or attorney shall make and file with the clerk of such court, an affidavit setting forth the nature and amount of the claim, so far as practicable, after allowing all just credits and set-offs, and any one or more of the causes mentioned in the preceding section, and also stating the place of residence of the defendants, if known, and if not known, that upon diligent inquiry the affiant has not been able to ascertain the same. * * *"

The affidavit for attachment here (Tr. 7), after stating that the defendants (respondents here) are indebted to plaintiff Martin for his fees as attorney in the amount of $2,655, sets forth as a reason for the attachment that:

"(1) Said Marian Schillo and Adele Schillo are not residents of this state, *or*

(2) Conceal themselves so that process cannot be served upon them, *or*

(3) Have departed from this state with the intention of having their effects removed from this state, *or*

(4) Are about to remove their property from this state, to the injury of said plaintiff, *or*

(5) Have, within two years prior to the filing of this affidavit, fraudulently concealed or disposed of their property so as to hinder and delay their creditors."

(Italics are ours.)

Thus five separate and distinct statutory grounds of attachment are referred to in the alternative, but the plaintiff does not swear that any of those grounds exists or is relied on.

The question before the Illinois Supreme Court was whether the foregoing affidavit complied with the statutory requirement that it set forth any one or more of the specified causes for attachment. In holding that the affidavit did not comply with the statute and that the court therefore acquired no jurisdiction to enter the judgment, the Illinois Supreme Court said (Tr. 63-66; 60 N. E. 2d 393-5):

"If the trial court in the attachment suit did not have jurisdiction of the subject matter, its judgment in that suit was void and without any effect and may be questioned at any time or place. * * *

Attachment proceedings are statutory. To give the court jurisdiction of the subject matter and the parties the statute must be strictly complied with. * * *

Attachment was unknown at the common law and, being a statutory proceeding, the affidavit required by the statute for the writ must meet all the essential requirements of the statute to give the court jurisdiction of the subject matter. (*Rabbitt* v. *Weber & Co.*, 297 Ill. 491; *Thormeyer* v. *Sisson*, 83 Ill. 188; *Pullian* v. *Nelson*, 28 Ill. 112; *Eddy* v. *Brady*, 16 (fol. 34) Ill. 306.) If an essential element of the affidavit is omitted it may not be aided by amendment, and the proceeding is without authority of law. A judgment entered when the record on its face shows want of

jurisdiction is void and of no force or effect. (*Rabbitt* v. *Weber & Co.*, 297 Ill. 491; *Booth* v. *Rees*, 26 Ill. 45.) The rule also is that a purchaser, whether he be a party to the record or a stranger, and all subsequent titleholders are chargeable with notice of the condition of the record and are not protected from the consequences of purchasing under a void judgment or decree. *Rabbitt* v. *Weber & Co.*, 297 Ill. 491; *Morris* v. *Hogle*, 37 Ill. 150. * * *

It is readily seen that the affidavit before us does not state which of the grounds therein set out is relied upon to sustain the attachment, and such cannot be ascertained. No positive statement is made whether Marion and Adele Schillo were non-residents, or concealed themselves so that summons could not be served upon them, or whether they had departed from the State with the intention of having their effects removed from the State, or had within two years fraudulently disposed of their property.

The authorities cited all held that to state separate and distinct grounds for writ of attachment in the alternative or disjunctive is not sufficient to give the court jurisdiction of the subject matter of the attachment for the reason that the affidavit does not positively state any ground.

Attachment is an action *in rem*, a statutory remedy. It is necessary, in order to give the court jurisdiction of the property sought to be attached, that the requisites of the statute be substantially complied with. If there be no such compliance, the court has no jurisdiction of the subject matter, without which any judgment entered pursuant to the levy made under authority of the writ of attachment is void and of no force. * * * The judgment and the proceedings had thereunder, including the deeds issued under the attachment and sale by the sheriff, were void."

In support of the holding that an affidavit setting forth the grounds for attachment in the alternative, was fatally defective, the court cited:

Cronin v. *Crooks*, 143 N. Y. 352; 38 N. E. 268.
Pierce v. *Boyle*, 242 Mich. 149; 218 N. W. 756.

Alvey v. *Smith*, 28 S. W. 2d (Tex. Civ. Appeal) 267.

Heaton v. *Panhandle Smelting Co.*, 32 Idaho 146 (150); 179 Pc. 510.

Rosenberg v. *Bullard*, 127 Cal. App. 315; 15 Pac. 2nd 870.

7 C. J. S. 296-7; "Attachment," Sec. 126, Par. b(2).

It thus appears that the decision involved only a construction of the Illinois attachment statute. The petitioners claimed title by virtue of proceedings under that statute. The court held that the proceedings were not in accord with the statute and hence that the petitioners derived no title. The defects complained of were of record in the case and petitioners, like any other purchasers of real estate, were bound by defects of record.

As the court said in *Rabbitt* v. *Weber & Co.*, 297 Ill. 491 (497-8), in holding void a purported title derived through a judicial sale on a judgment in attachment:

> "An attachment proceeding was unknown to the common law and is a harsh one in derogation of that law, and being wholly statutory must strictly conform to the statute. (*Haywood* v. *Collins*, 60 Ill. 328). The affidavit is the foundation of the suit, and it must meet the requirements of the statute in order to confer jurisdiction if there is no personal service or appearance by the defendant. * * * If he [the purchaser at the sale] should be regarded as a stranger to the record the law presumes that all men inspect public records through which a title is derived before purchasing, and on failure to do so the law will not protect a purchaser from the consequences of purchasing under a void decree. *Morris* v. *Hogle*, 37 Ill. 150."

Petitioners were parties to the proceedings in which the statute was construed and their title adjudicated. The court had jurisdiction over them and over the subject

matter of the litigation. There was thus no federal question involved. The Illinois court had sole right to construe the Illinois statute and to determine rights and titles claimed thereunder, and the United States Supreme Court will not review or revise the construction adopted by the Illinois court.

As was said by this court in dismissing for want of jurisdiction and holding to be frivolous an appeal from a decision of a state court construing a statute:

> "* * * it is elementary that this court is without authority to renew and revise the construction affixed to a state statute as to a state matter by the court of last record of the state."
>
> *Quong Ham Wah Co.* v. *Ind. Comm.*, 255 U. S. 445 (448).

In another case in dismissing a writ of error to a state court, this court said:

> "If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statutes of Ohio are repugnant to the Constitution of the United States, but whether the supreme court of Ohio has erred in its construction of them. It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."
>
> *Commercial Bank of Cincinnati* v. *Buckingham's Executors*, 5 How. 317 (342-3).
>
> *Ross* v. *Oregon*, 227 U. S. 150 (161-2).

And in *Roe* v. *Kansas*, 278 U. S. 191, in refusing to review a decision of the Kansas Supreme Court construing an eminent domain statute as authorizing the con-

demnation of appellant's property, this court said (pp. 192-3):

> "This writ of error to the Supreme Court of Kansas must be dismissed. The alleged grounds therefor are so lacking in substance that they may be properly designated as frivolous. * * *
>
> Under the circumstances here revealed the construction placed upon her statutes by the Supreme Court of Kansas is binding upon us. * * *
>
> The alleged ground for the present writ is without substance and the circumstances justify the imposition of a penalty upon the party at fault."

The ground upon which application for writ of certiorari is based in the instant case is equally without substance.

II.

THE DECISION OF THE ILLINOIS SUPREME COURT IS CORRECT.

Since the decision of the Illinois Supreme Court involved only questions of local law, it is not material here whether or not that decision was erroneous. This Court will not review it in any event.

The decision of the Illinois court was, however, correct and in accord with the great weight of authority. The following brief statement of points involved and authorities supporting them sustains this last proposition.

1.

The affidavit is the foundation of the suit and it must meet the requirements of the statute in order to confer jurisdiction, particularly where there is no personal service or appearance by the defendants.

Thormeyer v. *Sisson*, 83 Ill. 188 (189).

Rabbitt v. *Weber & Co.*, 297 Ill. 491 (497); 130 N. E. 787.

2.

The affidavit is required by statute to state that some one of the grounds for attachment exists. An affidavit which alleges the grounds in the alternative in effect states no ground, and is insufficient to give the court jurisdiction over the attached property or to serve as a basis for service upon the defendants by publication and mailing of notice.

See authorities cited, pp. 7-8, ante, and also the following:

Prins v. *Hinchcliffe*, 17 Ill. App. 153.

Kegel v. *Schrenkeisen*, 37 Mich. 174.

Banker v. *Hubbard*, 24 N. Y. Supp. (2nd) 286, (288).

Dintruff v. *Tuthill*, 17 N. Y. Supp. 556, 62 Hun. 591.

Porter v. *Boehme*, 160 Minn. 127 (128), 199 N. W. 895.

Goodyear Rubber Co. v. *Knapp*, 61 Wis. 103 (105); 20, N. W. 651 (652).

Winters v. *Pearson*, 72 Calif. 553 (554), 14 Pac. 30.

Culbertson v. *Cabeen*, 29 Tex. 247 (253).

Birchall v. *Griggs*, 4 N. Dak. 305 (307).

3.

Since the requirements of the affidavit for attachment are fully provided for in the Attachment Act, the provisions of Section 43 of the Civil Practice Act, (Ill. R. S. Ch. 110, par. 167) permitting a pleading in the alternative, has no application to any question as to the sufficiency of an affidavit.

Sec. 26, Attachment Act; Ill. R. S., Ch. 11, Par. 26.

Kirk v. *Dearth Agency*, 171 Ill. 207 (213, 214); 49 N. E. 413.

4.

Even, however, if the affidavit for attachment may have some of the attributes of a pleading, it is nevertheless also an affidavit and the rules of certainty applicable to affidavits must be applied in testing its sufficiency.

Brewer & Hoffman Brewing Co. v. *Boddie,* 59 Ill. App. 45; aff'd. 162 Ill. 346; 44 N. E. 819.

5.

Since the judgment was void, the judicial sale and deed are likewise void and the purchaser and grantees acquired no interest thereunder.

Rabbitt v. *Weber & Co.,* 297 Ill. 491 (498); 130 N. E. 787.

Hutson v. *Wood,* 263 Ill. 376 (387); 105 N. E. 343.

6.

A judgment void for lack of jurisdiction in the Court to enter it is a nullity, and may be set aside on motion at any time.

Thayer v. *Village of Downers Grove,* 369 Ill. 334 (339); 16 N. E. (2d) 717.

Fredrich v. *Wolf,* 383 Ill. 638; 50 N. E. (2d) 755.

Anderson v. *Anderson,* 292 Ill. App. 421 (428); 11 N. E. (2d) 216.

We submit that the petition for writ of certiorari should be denied.

S. Ashley Guthrie,
120 South La Salle Street,
Chicago (3), Illinois,
Counsel for Respondents.